No. 17-646

IN THE

Supreme Court of the United States

TERRENCE MARTEZ GAMBLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER AND NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

SARAH DEER
UNIVERSITY OF KANSAS
1541 Lilac Lane
Lawrence KS 66045
(785) 864-9713
sarah.deer@ku.edu

MARY KATHRYN NAGLE
Counsel of Record
WILSON K. PIPESTEM
ABI FAIN
JORDAN HARMON
PIPESTEM LAW P.C.
320 S. Boston Ave
Suite 1705
Tulsa, OK 74103
(202) 407-0591
mknagle@pipestemlaw.com

Counsel for Amici Curiae

November 1, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	6
I. Eradicating The "Separate Sovereigns" Exception To The Double Jeopardy Clause Would Bring Dire Consequences To Native Women	6
A. The Current Rates Of Violence Against Native Women Constitute A Crisis	6
B. Jurisdictional And Sentencing Limitations Imposed On Tribal Nations Renders Tribal-Federal Collaboration Critical For The Safety Of Native Women And Children	10
C. Overturning The "Separate Sovereigns" Exception In The Federal-Tribal Context Would Undermine Safety And Justice	17
D. The "Separate Sovereigns" Exception, As Applied To Tribal Court Prosecutions, Should Not Be Disturbed	24

TABLE OF CONTENTS—Continued

Page

II. Petitioner Provides No Sound Basis Or Rationale For The Eradication Of The "Separate Sovereigns" Doctrine 25

A. The Incorporation Of The Bill Of Rights Bears No Constitutional Relevance To The Application Of The "Separate Sovereigns" Doctrine To Tribal Prosecutions 25

B. The Application Of The Separate Sovereigns Doctrine To Tribal Court Prosecutions Does Not Implicate Federalism 29

C. The "Separate Sovereigns" Exception Recognizes That The "Unique Source" Of Tribal Nations' Criminal Prosecutorial Power Pre-Dates The U.S. Constitution 31

CONCLUSION 33

TABLE OF AUTHORITIES

CASES — Page(s)

Ex Parte Crow Dog,
109 U.S. 556 (1883) 11, 12

Fox v. Ohio,
46 U.S. (5 How.) 410 (1847) 24

Heath v. Alabama,
474 U.S. 82 (1985) 24

Kelsey v. Pope,
Case No. 14-1537, 2016 WL 51243
(6th Cir. 2016) 27

Lone Wolf v. Hitchcock,
187 U.S. 553 (1903) 28

Michigan v. Bay Mills Indian Cmty.,
134 S. Ct. 2024 (2014) 27, 28

Oliphant v. Suquamish,
435 U.S. 191 (1978) 9, 14

Puerto Rico v. Sanchez Valle,
136 S.Ct. 1863 (2016) 26, 30, 31, 32

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 5, 27, 28, 31

Talton v. Mayes,
163 U.S. 376 (1896) 27, 30

United States v. Bryant,
136 S.Ct. 1954 (2016) ..... *passim*

United States v. Castleman,
134 S. Ct. 1405 (2014) 22

United States v. Enas,
255 F.3d 662 (9th Cir. 2001) 31-32

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Kagama,
118 U.S. 375 (1886) 11, 30

United States v. Lara,
541 U.S. 193 (2004)..... 11, 27, 31, 32

United States v. McBratney,
104 U.S. 621 (1881)..... 12

United States v. Wheeler,
435 U.S. 313 (1978).....*passim*

CONSTITUTION

U.S. Const. amend. V .....*passim*

U.S. Const. amend. X 30

U.S. Const. amend. XIV 27

STATUTES

18 U.S.C. § 117(a)..... 12

Act of Feb. 18, 1875, c. 80, sec. 1, § 2146,
18 Stat. 318 (codified at 18 U.S.C.
§ 1152-53)..... 11

Act of May 31, 1946, ch. 279, 60 Stat. 229.... 14

Indian Civil Rights Act, 25 U.S.C. § 1302
(2006)..... 16, 27, 28

25 U.S.C. § 1302(a)(7) 16

25 U.S.C. § 1302(a)(8) 27

25 U.S.C. § 1303..... 27

TABLE OF AUTHORITIES—Continued

Page(s)

Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, § 7, 94 Stat. 317, 320-21 (1980) (codified at 25 U.S.C. § 766 (2006)) 14

Pub. L. No. 83-280, 67 Stat. 588 (codified as amended 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25, 28 U.S.C. § 1360 (2012)) 13

Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2279-80 (codified at 25 U.S.C. § 1302) 16, 20

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §901(6), 119 Stat. 3077 (2005) 6

Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 (codified at 18 U.S.C. § 113) 12, 14, 15-16

18 U.S.C. § 113(b)(1) 12

Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704 (codified at 25 U.S.C. § 1771 *et seq.* (2006)) 13

§ 7, 101 Stat. 707 (codified at 25 U.S.C. § 1771e) 13

§ 9, 101 Stat. 709 (codified at 25 U.S.C. § 1771g) 13

TABLE OF AUTHORITIES—Continued

REGULATIONS Page(s)

Confederated Salish and Kootenai Tribes, Montana; Acceptance of Retrocession of Jurisdiction, 60 Fed. Reg. 33,318 (June 9, 1995) 14

U.S. Dep't Of Justice, Memorandum For United States Attorneys With Districts Containing Indian Country (Jan. 11, 2010), *available at* https://www.justice.gov/archives/dag/memorandum-united-states-attorneys-districts-containing-indian-country 16, 19

LEGISLATIVE MATERIALS

151 Cong. Rec. S4873-84 (daily ed. May 10, 2005) 12, 23

159 Cong. Rec. E217-03 (daily ed. Feb. 28, 2013) 15

159 Cong. Rec. S480-02 (daily ed. February 7, 2013) 14, 15

S. 797, 111th Cong. (2009-2010) 17

Tribal Courts and The Administration of Justice in Indian Country: Hearing Before the Senate Comm. On Indian Affairs, 110th Cong. 576 (2008) 21

Examining Federal Declinations to Prosecute Crimes in Indian Country, Hearing before the Senate Comm. On Indian Affairs, 110th Cong. 683 (2008) ... 20

TABLE OF AUTHORITIES—Continued

Page(s)

S. Rep. No. 90-841 (1967) 12

S. Rep. 111-93 (Oct. 29, 2009) 17

OTHER AUTHORITIES

Andre B. Rosay, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Violence Against American Indian and Alaska Native Women and Men* (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf 7

Andre R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges* (2008), http://niccsa.org/uploads/file/2da34f8956824cc8882578ca88ad8a6f/PRACTICALIMPLICATIONSOFCURRENTDOMESTICVIOLENCERESEARCH.pdf 22

Cheryl Regehr & Tamara Sussman, *Intersections Between Grief and Trauma: Toward an Empirically Based Model for Treating Traumatic Grief*, 4 Brief Treatment & Crisis Intervention 289 (2004) 9

Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceeding for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7 (1987) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Deborah Bassett et al., *Posttraumatic Stress Disorder and Symptoms among American Indians and Alaska Natives: A Review of the Literature*, 49 Soc. Psychiatry & Psychiatric Epidemiology 417 (2014) 8

Indian Law and Order Comm'n, *A Roadmap for Making Native America Safer, Report to the President and Congress of the United States* (November 2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf 21

J. Douglas Bremner et al., *Structural and Functional Plasticity of the Human Brain in Posttraumatic Stress Disorder*, 167 Prog. Brain Res. (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3226705/ ... 7, 9

Jane Koziol-McLain et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Public Health 1089 (2003) 23

Jitender Sareen et al., *Physical and Mental Comorbidity, Disability, and Suicidal Behavior Associated With Posttraumatic Stress Disorder in a Large Community Sample*, 69 Psychosomatic Med. 242 (2007) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709 (2006), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1543&context=mlr 18, 19

Lawrence Greenfeld et al., U.S. Dep't of Justice, NCJ-167237, *Violence by Intimates* (1998), http://bjs.gov/content/pub/pdf/vi.pdf 23

M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663 (2011) 13

Matthew Miller, *The Silent Abuser: California's Promotion of Misdemeanor Domestic Violence*, 34 West. State Univ. L. Rev. 173 (2007) 22

Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976) 14

Ruth E. Fleury et al., *When Ending the Relationship Doesn't End the Violence, 6 Violence Against Women* 1363 (2000) 22

Teresa N. Brockie et al., *A Framework to Examine the Role of Epigenetics in Health Disparities among Native Americans*, 2013 Nursing Res. & Prac. 1 (2013) 8

The Federalist No. 51 (James Madison) 29

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Dep't Of Justice, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, *Att'y Gen.'s Advisory Comm. on American Indian/ Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive* (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf [https://perma.cc/ E33X-85YG] ... 8

Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627 (1998) 13

INTEREST OF THE *AMICI CURIAE*[1]

As national organizations working to end domestic violence and sexual assault against Native women and children, the National Indigenous Women's Resource Center ("NIWRC") and the National Congress of American Indians ("NCAI") understand the significance of the "separate sovereigns" doctrine and the role it plays in ensuring the effective prosecution of those who seek to harm Native women and children.

The NIWRC is a Native non-profit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. The NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States. Collectively, these women have extensive experience in Tribal Courts, tribal governmental process, and programmatic and educational work to end violence against Native women and children, including domestic violence and sexual assault.

NCAI is the oldest and largest national organization representing Indian tribal governments, with a membership of more than 250 American Indian Tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian Tribes and improve the welfare of American Indians. It frequently participates in matters before this Court that implicate the

---

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief.

interests of Indians and Indian Tribes. As relevant here, American Indian and Alaska Native women are battered, raped, and stalked at far greater rates than any other population of women in the United States. Since the establishment of the NCAI Task Force on Violence Against Women in 2003, enhancing the safety of Native women has been a critical focus of NCAI's work.

As organizations committed to ending violence against Native women, *Amici* have a unique perspective on the relationship between Congress's authority over Indian affairs, the inherent sovereign authority of Tribal Nations to prosecute crimes committed against their own citizens, and safety for Native women and children.

SUMMARY OF THE ARGUMENT

Overturning the Court's long-standing precedent regarding the dual sovereign doctrine, which has allowed both tribal and the federal governments to prosecute for violations of their respective criminal laws, would have significant ramifications in Indian country. Not only would it undermine core principles of local control for criminal justice, it would preclude the effective prosecution of those who commit serious violent crimes against Native women and children.

Today, Native women and children face the highest rates of domestic violence, murder, and sexual assault in the United States. The ability of both sovereigns to prosecute takes on heightened importance in light of the sentencing limitations placed on Tribal Courts by the federal Indian Civil Rights Act and the well-documented challenges the federal government has in investigating and prosecuting inherently local crimes,

which it is often times poorly suited to do on its own without assistance or local collaboration.

Within the complex web of jurisdictional determinations that the separate sovereigns must undertake, U.S. Attorneys and Tribal Prosecutors have grown accustomed to the existing jurisdictional scheme, which allows for concurrent jurisdiction and the possibility of prosecution by two sovereigns in many cases. Changing this rule would destabilize an already precarious jurisdictional scheme at the expense of victims, particularly those who experience serious domestic or sexual violence.

That is, the eradication of the "separate sovereigns" doctrine would require a Tribal Nation to decide whether to prosecute a case before the U.S. Attorney has had sufficient time to perform the necessary investigation to determine whether he or she will prosecute under federal law and sentencing authority. The Tribal Nation may be forced to go ahead and prosecute, and without the "separate sovereigns" exception, such a prosecution would then preclude the possibility of a more meaningful and deterrent sentence authorized under federal jurisdiction. *See United States v. Wheeler*, 435 U.S. 313, 331 (1978) ("Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated."). And thus, until or unless tribal criminal jurisdiction—and sentencing authority—is fully and completely restored, federal prosecutions will remain an essential tool in preserving the safety of Native women and children in their own homes.

A decision to overturn the "separate sovereigns" doctrine in its entirety, therefore, would significantly

increase the danger Native women and children face from domestic violence and sexual assault crimes committed on tribal lands. This Court should preserve the "separate sovereigns" doctrine as applied to prosecutions by both tribal governments and the federal government, either by rejecting Petitioner's arguments in their entirety or by making it clear that this Court's decision in this case should not be read as addressing the unique considerations presented in the context of dual federal and tribal prosecutions. This is both the correct application of this Court's longstanding precedents concerning the pre-constitutional and inherent sovereignty of Tribal Nations, as well as a practical necessity given the sentencing and jurisdictional limitations now imposed on the authority of Tribal Nations.

Petitioner's broad arguments bear no relation to the application of the "separate sovereigns" doctrine within the context of Tribal Court prosecutions. Petitioner argues that "[t]his Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause" because "[t]he separate-sovereigns exception is incompatible with the text, original meaning, and purpose of the Double Jeopardy Clause." Pet'r's Br. 4. None of Petitioner's arguments, however, support overturning the doctrine as applied to Tribal Court prosecutions.

For instance, Petitioner avers that this Court's decision in 1967 to incorporate the Bill of Rights against the States commands the erasure of the doctrine in its entirety because "[t]he separate-sovereigns exception developed on the understanding that the Double Jeopardy Clause did not apply to the states, and has not been re-visited since the Court held to the contrary," and thus "[i]ncorporation eliminated the

separate-sovereigns exception's doctrinal justification." Pet'r's Br. 7-8.

Congress, however, has determined that the Double Jeopardy Clause does not bar joint federal and tribal prosecutions for the same or similar crimes. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (affirming Congress's decision not to incorporate the Bill of Rights as a whole and instead "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). This Court's decision to incorporate the Bill of Rights against the States, therefore, in no way constitutes a limitation on the inherent right of Tribal Nations to prosecute crimes on tribal lands, nor does it infringe on Congress's decision to apply the Double Jeopardy Clause to Tribal Court prosecutions in a manner that would preclude dual federal and tribal prosecutions. As such, the incorporation of the Bill of Rights against the States does not support the eradication of the "separate sovereigns" exception in its entirety.

Petitioner next asserts that "[t]he separate-sovereigns exception [] conflicts with . . . core principles of federalism" and "turns the liberty-preserving purpose of federalism on its head." Pet'r's Br. 6-7. Petitioner's argument, however, wrongfully assumes that the "separate sovereigns" exception was crafted only to address the intersections of criminal prosecutions between two interrelated sovereigns: the United States and the States.

It was not. The "separate sovereigns" doctrine, since its inception, has preserved the inherent sovereign authority of Tribal Nations, as well as the federal government's concomitant trust duty and obligation to protect Native women and children from those who

seek to repeatedly beat, batter, and abuse them. Nothing in the United States Constitution condones the departure from a doctrine that, within the complex landscape of federal Indian law, provides Native women and children with protection to deter domestic violence and sexual assault offenders. Quite the opposite, as a result of "the unique legal relationship of the United States to Indian tribes," the federal government has a "trust responsibility to assist tribal governments in safeguarding the lives of Indian women," Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §901(6), 119 Stat. 3077 (2005) (VAWA 2005), and accordingly, the "separate sovereigns" doctrine must be preserved to ensure Native women and children are protected to the fullest extent possible under the law.

Petitioner's attempts to dismiss the "separate sovereigns" doctrine, therefore, should be denied and the doctrine should be preserved.

ARGUMENT

I. Eradicating The "Separate Sovereigns" Exception To The Double Jeopardy Clause Would Bring Dire Consequences To Native Women.

A. The Current Rates Of Violence Against Native Women Constitute A Crisis.

In 2016, this Court acknowledged that Native women experience the highest rates of violence in the United States. *See United States v. Bryant*, 136 S.Ct. 1954, 1959 (2016). And since this Court's decision in *Bryant*, the National Institute of Justice ("NIJ"), an arm of the United States Department of Justice, has released data revealing that Native women suffer rates of domestic violence and sexual assault even

higher than those cited by this Court in 2016. In May 2016, the NIJ released its report, *Violence Against American Indian and Alaska Native Women and Men*, documenting the astonishingly high rates of violence against Native people.[2] The report includes facts that are sufficiently stunning as to be almost incomprehensible. According to the NIJ's May 2016 report, more than 4 in 5 Native people have been victims of violent crime.[3] Over half (56.1%) of Native women report being victims of sexual violence.[4]

The high rates of violence against Native women and children constitute nothing short of an emergency that threatens the health, safety, welfare—and ultimately the sovereignty—of Tribal Nations. Widespread, commonplace sexual and domestic violence have taken a toll on Native communities. Victimization, and the unresolved trauma that follows, are directly linked to the significant mental and physical health disparities Native people experience in the United States.[5]

These disparities are most apparent in the statistics documenting the high rates of Post-Traumatic Stress Disorder ("PTSD") that Native women and children

---

[2] *See, e.g.* Andre B. Rosay, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Violence Against American Indian and Alaska Native Women and Men* 44 (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

[3] *Id.*

[4] *Id.* at 43.

[5] *See* J. Douglas Bremner et al., *Structural and Functional Plasticity of the Human Brain in Posttraumatic Stress Disorder*, 167 Prog. Brain Res. 2 (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3226705/.

suffer.[6] These high rates of PTSD are directly linked to the extraordinarily high rates of violent crimes committed against Native women and children. Indeed, PTSD has been declared "one of the most serious mental health problems faced by . . . AI/AN populations."[7]

In 2014, the United States Attorney General's Advisory Committee released a report documenting that Native children experience higher-than-average rates of abuse.[8] The trauma in tribal communities is so significant that Native youth suffer PTSD at rates equivalent to soldiers returning from the wars in Afghanistan and Iraq.[9] And for Native American adults, the rate of PTSD is 4.4 times the national average.[10]

---

[6] Deborah Bassett et al., *Posttraumatic Stress Disorder and Symptoms among American Indians and Alaska Natives: A Review of the Literature*, 49 Soc. Psychiatry & Psychiatric Epidemiology 417 (2014).

[7] *Id.* at 418.

[8] U.S. Dep't Of Justice, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, *Att'y Gen.'s Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive* 6 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf [hereinafter *Ending Violence*] [https://perma.cc/E33X-85YG] ("American Indian and Alaska Native . . . children suffer exposure to violence at rates higher than any other race in the United States.").

[9] *Id.* at 38 ("[O]ne report noted that AI/AN juveniles experience post-traumatic stress disorder (PTSD) at a rate of 22 percent. Sadly, this is the same rate as veterans returning from Iraq and Afghanistan, and triple the rate of the general population.").

[10] Teresa N. Brockie et al., *A Framework to Examine the Role of Epigenetics in Health Disparities among Native Americans*, 2013 Nursing Res. & Prac. 1, 3 (2013).

PTSD, however, is not the inevitable result of trauma. Instead, PTSD is a consequence of *unresolved* trauma—that is, trauma for which there has been no adequate intervention.[11] Unresolved trauma is the leading cause of PTSD, which in turn burdens the victim with a wide variety of mental and physical maladies,[12] such as mental illness, addiction, and even chronic physical conditions such as chronic heart, lung, and liver disease.[13]

For many survivors, the prosecution of his or her perpetrator is critical to resolving the trauma resulting from the violent crime.[14] Of all American Indians who have suffered violence, around ninety percent have experienced violence perpetrated by a non-Indian. Yet in 1978, Tribal Nations lost the ability to exercise their inherent authority to prosecute crimes committed by non-Indians on tribal lands. *See Oliphant v. Suquamish*, 435 U.S. 191 (1978). Moreover, even where Tribal Nations retain their inherent authority to criminally prosecute, current federal law often limits their sentencing authority—thereby precluding the ability of a tribal prosecution to achieve effective

---

[11] Cheryl Regehr & Tamara Sussman, *Intersections Between Grief and Trauma: Toward an Empirically Based Model for Treating Traumatic Grief*, 4 Brief Treatment & Crisis Intervention 289, 294 (2004).

[12] *See generally*, Bremner et al., *supra* note 5.

[13] *See* Jitender Sareen et al., *Physical and Mental Comorbidity, Disability, and Suicidal Behavior Associated With Posttraumatic Stress Disorder in a Large Community Sample*, 69 Psychosomatic Med. 242, 244-45 (2007).

[14] *See* Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceeding for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7 (1987).

resolution or closure, absent the duality of federal prosecution.

Laws that prevent prosecution of those who commit domestic violence and sexual assault against Native women and children directly contribute to the staggering levels of PTSD in tribal communities. Although violence against Native women and children traces its roots to the origins of colonial conquest, its continued cultural acceptance is made possible by a legal framework that prevents Tribal Nations from prosecuting a majority of the crimes committed against their women and children. Precluding the contemporary collaborations and dual prosecutions between federal and tribal governments, therefore, would only further perpetuate the crisis Native women and children now face.

B. Jurisdictional And Sentencing Limitations Imposed On Tribal Nations Renders Tribal-Federal Collaboration Critical For The Safety Of Native Women And Children.

The practical necessity of the "separate sovereigns" doctrine is made evident by the complex jurisdictional maze both federal and tribal sovereigns must navigate to determine which sovereign, in response to any given crime, may or should prosecute.

Discerning which sovereign may exercise criminal jurisdiction over a particular crime in Indian country is rife with complications. The current state of federal law dictates that, before a sovereign may exercise criminal jurisdiction over a crime committed in Indian country, the sovereign must determine (1) the status of the land where the crime was committed; (2) whether the perpetrator is Indian; and (3) whether the victim

is Indian. *See United States v. Lara*, 541 U.S. 193 (2004). Discerning these factual perquisites to the exercise of jurisdiction impedes the ability of police to respond in a timely manner to the heightened crisis of a domestic violence call, thereby placing Native women and children at greater risk.

To be sure, the legal obstacles to prosecutions in Indian country have been accumulating for more than a hundred years. In 1883, this Court concluded that the federal government is without criminal jurisdiction to prosecute Indian-on-Indian crimes unless or until Congress authorizes such jurisdiction.[15] *See Ex Parte Crow Dog*, 109 U.S. 556, 570 (1883) (the United States could not exercise jurisdiction over "the case of a crime committed in the Indian country by one Indian against the person or property of another Indian" unless so authorized by Congress); *see also United States v. Kagama*, 118 U.S. 375, 383 (1886) (Congress has the constitutional authority to "define[] a crime committed [] and ma[k]e it punishable in the courts of the United States.").

In response to *Crow Dog*, Congress enacted the Major Crimes Act in 1885, authorizing federal criminal jurisdiction over the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, assault with intent to commit rape, carnal knowledge, arson, burglary, robbery, embezzlement, and larceny committed by an Indian against another Indian or other person. *See* 18 U.S.C. §§ 1152-53;

---

[15] In *Ex Parte Crow Dog*, this Court interpreted § 2146 of the General Crimes Act as exempting from federal criminal jurisdiction any "crime committed in the Indian country by one Indian against the person or property of another Indian." 109 U.S. 556, 570 (1883) (citing Act of Feb. 18, 1875, c. 80, sec. 1, § 2146, 18 Stat. 318 (codified as amended at 18 U.S.C. § 1152)).

see also S. Rep. No. 90-841, 12 (1967) ("Congress enacted the 'Major Crimes Act' in 1885" in response to "an early Supreme Court case, *Ex parte Crow Dog*, 109 U.S. 556 (1883)").

The Major Crimes Act did not, however, give the federal government jurisdiction to prosecute any offense not enumerated in the Act, nor did it work to divest Tribes of their inherent jurisdiction over the Act's enumerated crimes. As a result, many crimes involving Indian offenders and non-Indian victims, particularly misdemeanor level assaults, are now the sole purview of the tribal government. Whereas more serious crimes involving only Indians,[16] and crimes involving a non-Indian victim and an Indian offender, may be prosecuted by both the tribal and federal government.[17]

---

[16] Crimes in Indian country that involve only non-Indians generally fall under state jurisdiction. *See United States v. McBratney*, 104 U.S. 621, 624 (1881).

[17] Thanks to the enactment of 18 U.S.C. § 117(a), the federal government can also exercise criminal jurisdiction over what might otherwise be considered misdemeanor level domestic violence crimes if they are committed by "habitual offenders" as defined in § 117(a). *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 (codified at 18 U.S.C. § 113); 18 U.S.C. § 117(a); *see also* 151 Cong. Rec. S4873-84 (daily ed. May 10, 2005) (statement of Sen. McCain) (Congress enacted 18 U.S.C. § 117(a) "[t]o close existing gaps in Federal criminal laws . . . [that fail] to address incidents of domestic violence" perpetrated against Native women). Congress also recently lowered the standard of assault in the Major Crimes Act from "serious bodily injury" to "substantial bodily injury." *See* 18 U.S.C. § 113; 18 U.S.C. § 117(a). The term "substantial bodily injury" means "bodily injury which involves—(A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." 18 U.S.C. § 113(b)(1). The "substantial bodily injury" amendment means that Native women are no longer

Additionally, numerous federal laws, including Public Law 280 ("PL-280"), limit the charges that federal prosecutors can bring against both Indian and non-Indian offenders who commit crimes in Indian country located within certain States.[18] Pub. L. No. 83-280, 67 Stat. 588 (codified as amended 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25, & 28 U.S.C. § 1360 (2012)). Specifically, PL-280 and PL-280-like statutes delegate the federal criminal jurisdiction created in the Major Crimes Act to certain State Governments. Thus, for assaults committed against Native women in those States, the federal government simply cannot intervene or press charges. *See* 18 U.S.C. § 1162.[19]

---

required to wait until their body is disfigured or they lose the function of a bodily member and/or organ to witness their perpetrator's federal prosecution.

[18] Congress enacted PL-280 in 1953, effectively "shifting federal criminal jurisdiction over Indian Country to [select] states regardless of tribal consent." M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 674 (2011). Since its inception, PL-280 has been criticized for creating "jurisdictional uncertainty" between Tribes and States, the effects of which have resulted in a lack of law enforcement responsiveness due to States' "inability or unwillingness" to perform their mandated responsibilities under the law. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1635-37 (1998).

[19] "States with Indian country lands that do *not* appear to presently be affected directly or indirectly by P.L. 280 or P.L. 280-like statutes are Alabama, Arizona, Louisiana, Michigan, Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South Dakota, and Wyoming." Leonhard, *supra* note 18 at 692 (emphasis added). In contrast, there are many States where federal law gives rise to the same jurisdictional issues resulting from PL-280. *See e.g.*, Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, §§ 7, 9, 101 Stat. 704, 707-10, (codified at 25 U.S.C. §§ 1771e, 1771g (2006));

And in 1978, this Court concluded that Tribal Nations could no longer exercise criminal jurisdiction over crimes committed by non-Indians on tribal lands, unless or until Congress elects to restore such jurisdiction. *See Oliphant v. Suquamish*, 435 U.S. 191, 195 (1978). Thus, prior to 1978, a Native woman or child suffering from domestic violence or sexual assault on tribal lands could seek the refuge of his or her tribal police, prosecutors, and courts—regardless of whether the perpetrator was Indian or non-Indian. After 1978, however, a Native woman or child's ability to secure safety from domestic violence and sexual assault offenders was rendered subject to a complex set of rules that—in all too many instances—made calling the police useless—if not dangerous.

This complex set of rules is often referred to as a "jurisdictional maze,"[20] or as some Members of Congress now refer to it, "a jurisdictional loophole."[21] In re-authorizing VAWA in 2013, Congress specifically identified the loss of tribal criminal prosecutorial power over non-Indian crimes on tribal lands as a major contributing factor to the incredibly high rates of violence perpetrated against Native women. As Senator Tom Udall explained:

Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, § 7, 94 Stat. 317, 320-21 (1980) (codified as amended at 25 U.S.C. § 766 (2006)); Act of May 31, 1946, ch. 279, 60 Stat. 229; Confederated Salish and Kootenai Tribes, Montana; Acceptance of Retrocession of Jurisdiction, 60 Fed. Reg. 33,318 (June 9, 1995).

[20] *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 508-13 (1976).

[21] 159 Cong. Rec. S480-02, S488 (daily ed. February 7, 2013) (statement of Sen. Tom Udall).

> Here is the problem: Tribal governments are unable to prosecute non-Indians for domestic violence crimes. They have no authority over these crimes against Native American spouses or partners within their own tribal lands. . . .
>
> Non-Indian perpetrators often go unpunished. Yet over 50 percent of Native women are married to non-Indians, and 76 percent of the overall population living on tribal lands is non-Indian.
>
> The result is an escalating cycle of violence. On some tribal lands, the homicide rate for Native women is up to 10 times the national average—10 times the national average. . . .
>
> Native women should not be abandoned to a jurisdictional loophole. In effect, these women are living in a prosecution-free zone. The tribal provisions in VAWA will provide a remedy.

159 Cong. Rec. S480-02, S488 (daily ed. February 7, 2013) (statement of Sen. Tom Udall). And as Representative Sheila Jackson Lee of Texas noted:

> VAWA Reauthorization closes jurisdictional loopholes to ensure that those who commit domestic violence in Indian country do not escape justice. The bill addresses a gaping jurisdictional hole by giving tribal courts concurrent jurisdiction over Indian and non-Indian defendants who commit domestic violence offenses against an Indian in Indian country.

159 Cong. Rec. E217-03, E218 (daily ed. Feb. 28, 2013) (statement of Rep. Jackson Lee). To be sure, VAWA

2013's restoration of tribal jurisdiction over non-Indian domestic violence offenders constitutes a significant, and important, step to fully restoring the inherent right of Tribal Nations to protect their women and children.

Other obstacles limiting the ability of Tribal Nations to effectively address crime in Indian Country, however, remain. Even where Tribal Nations may exercise jurisdiction over a crime, federal law currently precludes their ability to impose meaningful, substantive penalties, leaving the U.S. Attorney the only prosecutor with the authority to impose a sufficient sentence for serious criminal conduct. *See, e.g.*, U.S. Dep't of Justice Memorandum For United States States Attorneys With Districts Containing Indian Country (Jan. 11, 2010), https://www.justice.gov/archives/dag/memorandum-united-states-attorneys-districts-containing-indian-country (noting that under current federal law, "in much of Indian Country, the Justice Department alone has the authority to seek a conviction that carries an appropriate potential sentence when a serious crime has been committed").

The Indian Civil Rights Act ("ICRA") prohibits Tribal Courts from imposing a prison term greater than one year for any criminal offense, including domestic violence. 25 U.S.C. § 1302(a)(7) (2006).[22] And as this

---

[22] In 2010, Congress passed, and the President signed into law, the Tribal Law and Order Act ("TLOA"). The TLOA amended the Indian Civil Rights Act to provide that Tribal Courts may impose sentences of up to three years of imprisonment for any one offense if certain requirements are met. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2279-80 (codified at 25 U.S.C. § 1302). To date, very few Tribes have been able to implement the full enhanced sentencing authority conditionally granted in the TLOA.

Court noted in *Bryant*, in the context of domestic violence, "a year's imprisonment per offense . . . [is] insufficient to deter repeated and escalating abuse." *United States v. Bryant*, 136 S.Ct. 1954, 1961 (2016); *see also* S. Rep. 111-93, 55 (Oct. 29, 2009) (accompanying S. 797, "'The lack of a system of graduated sanctions through tribal court . . . directly contributes to the escalation of adult and juvenile criminal activity.'") (quoting Former U.S. Attorney General Janet Reno).

These stringent sentencing limitations imposed on Tribal Nations, and the jurisdictional maze catalogued above, give the dual sovereign doctrine heightened importance to securing safety for Native women and children.

C. Overturning The "Separate Sovereigns" Exception In The Federal-Tribal Context Would Undermine Safety And Justice.

The eradication of the "separate sovereigns" doctrine, therefore, would prevent the effective prosecution of violent crimes committed against Native women and children. Without the "separate sovereigns" exception to the Double Jeopardy Clause, Tribes throughout Indian country will be forced to choose between: (1) waiting to see whether federal charges will be filed to allow for a meaningful sentence that matches the severity of the crime and thus risk losing the possibility of a subsequent tribal charge in the event a federal declination comes after the tribal statute of limitations has passed; or (2) bringing tribal charges to ensure some sort of redress, thereby preventing federal prosecution and sufficient sentencing to prevent repeated or future violent crimes committed by the same, or additional, offenders.

As described above, there are some instances where Tribes are better equipped to literally remove a violent offender off the street and prevent continuing or escalating violence. On the other hand, given the jurisdictional and sentencing limitations imposed on Tribal Courts, the U.S. Attorney will, in some instances, be better able to secure a sentence that reflects the gravity of the crime committed, and ultimately, secure the deterrence necessary to ensure safety for a Native victim of domestic violence or sexual assault.

Despite the complexity of the jurisdictional maze and limitations imposed on their sentencing authority, Tribal Nations have remained committed to protecting their communities. Indeed, this is one of the most fundamental things that a government does.[23] In this regard, tribal authorities have worked with federal authorities to develop strategies and collaborations to secure justice for Native victims. Accordingly, coordination between federal and tribal governments is essential to effective law enforcement in Indian country. As the Deputy U.S. Attorney General noted in recent years, "[m]any sexual assault cases arising in Indian Country require a team investigative effort involving

---

[23] As Dean Kevin Washburn of the University of Iowa explained in his seminal law review article *Indians, Crime, and the Law*, "In the United States, criminal justice is an inherently local activity as a matter of constitutional design; American criminal justice systems are carefully designed to empower local communities to solve internal problems and to restore peace and harmony in the community." Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709, 713 (2006). Justice at the tribal level is an important expression of the community's norms and its condemnation when those norms are breached. Federal prosecutions in an often distant court by outsiders, therefore, simply cannot provide the same sense of justice for the community. *See id.*

FBI, tribal police, and BIA. Successful multijurisdictional investigations and prosecutions also require a collaborative working relationship."[24]

This collaboration is key because investigations undertaken exclusively by the federal government, in Indian country, often take a long time. There are often very few FBI agents assigned to a particular reservation, and their office may be a considerable distance away. Some of the challenges FBI agents may face have been explained by Dean Washburn:

> On rural parts of reservations that are accessed by dirt roads without street signs or visible addresses on the homes, however, effective investigation may require significant local knowledge of homes and other locations. It may also require some knowledge of family ties and social networks in the community. Because Indian communities are often relatively closed to strangers, federal law enforcement officers such as FBI agents face a significant handicap.[25]

The problem of delay during the course of a federal investigation is further exacerbated when federal and tribal prosecutors do *not* collaborate, as evidenced in the testimony of M. Brent Leonhard, Deputy Attorney General of the Confederated Tribes of the Umatilla Indian Reservation, before the Senate Committee on Indian Affairs. Leonhard testified concerning a 2007

---

[24] Memorandum For United States States Attorneys With Districts Containing Indian Country (Jan. 11, 2010), https://www.justice.gov/archives/dag/memorandum-united-states-attorneys-districts-containing-indian-country

[25] Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709, 713 (2006).

case from the Crow Nation involving the sexual molestation of a six-year-old girl. The federal prosecutors ultimately declined to prosecute the case, but not before the tribal statute of limitations had run. The victim not only had to wait for the federal prosecutors to make a decision, but then ultimately had no recourse at all. *See Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing before the Senate Comm. On Indian Affairs*, 110th Cong. 683 (2008) (statement of M. Brent Leonhard).

In contrast, the Indian Law and Order Commission, an intergovernmental body created by the Tribal Law and Order Act of 2010, Pub. L. 111-211 (TLOA), recorded an example of the success, and increased safety, that comes with interjurisdictional coordination. As the Commission's final report, published in May 2015, noted:

> Even the most basic forms of interjurisdictional cooperation can save money and lives. For example, on the Ute Mountain Ute Reservation in Colorado, the late Chairman Ernest House, Sr. fought back when violence threatened to overwhelm his community. In 2005-06, reported homicide rates on the Ute Mountain Ute Reservation ranged between 250 and 300 per 100,000 people, as compared to a statewide rate of 4 out of 100,000. Stated another way, had the city of Denver experienced the same homicide rates as the Ute Mountain Indian Reservation, Denver would have had more than 1,900 murders instead of the 144 that actually occurred.
>
> In response, Chairman House convened the Ute Mountain Ute Law Enforcement Working Group, chaired by Gary Hayes, who was then

> Tribal Council vice chair. The working group met at least monthly to prevent and combat crime. This group quickly gained momentum and began focusing on better coordination across jurisdictional lines. . . . According to Mr. Hayes, who is now chairman, violent crimes rates have fallen in virtually every major category, and the reservation experienced just one homicide in the past two years. "Working together is saving our people," he said.[26]

The eradication of the "separate sovereigns" doctrine, however, would require a Tribal Nation to choose whether to prosecute a case before the conclusion of the investigation that determines whether the U.S. Attorney will prosecute. And if the Tribal Nation elects to prosecute prior to the expiration of the tribal statute of limitations—and prior to the conclusion of the federal investigation—without the "separate sovereigns" exception, the tribal prosecution would preclude the more meaningful and deterrent sentencing authorized under federal jurisdiction.

And if a Tribal Nation elects to forego prosecution, in the hopes that the U.S. Attorney will conclude his or her investigation and bring federal charges, the victim may face a situation where no charges are brought at all—as federal prosecution is never guaranteed. *See Tribal Courts and The Administration of Justice in Indian Country Hearing Before the Senate Comm. On Indian Affairs*, 110th Cong. 576 (2008)

---

[26] Indian Law and Order Comm'n, *A Roadmap for Making Native America Safer, Report to the President and Congress of the United States* 113 (November 2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf

(statement of Sen. Byron L. Dorgan) ("in the four years from 2004 to 2007, the United States Government declined to prosecute an average of 62 percent of reservation crimes. This means that nearly 75 percent of adult and child sex crimes and 50 percent of reservation homicides, went unpunished in the Federal system.").

Failure to prosecute crimes committed against Native women and children is not without consequence. Prosecution is indispensable to addressing the repetitive nature of domestic violence. As the NIJ has reported, "prosecution deters domestic violence if it adequately addresses abuser risk by imposing appropriately intrusive sentences."[27] Furthermore, the repetitive nature of domestic violence means that violence increases in severity with each repeated act of abuse. *See United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014) ("Domestic violence often escalates in severity over time. . . . "). Thus, when no intervention occurs, a victim typically experiences an ever-increasing severity of violence.[28] Even when domestic violence victims are able to escape the relationship, the likelihood of additional violence increases.[29] The risk of lethal violence is particularly salient; spouses and partners commit a significant portion

---

[27] *See, e.g.*, Andre R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges* 47 (2008), http://niccsa.org/uploads/file/2da34f8956824cc8882578ca88ad8a60/PRACTICALIMPLICATIONSOFCURRENTDOMESTICVIOLENCERESEARCH.pdf.

[28] Matthew Miller, *The Silent Abuser: California's Promotion of Misdemeanor Domestic Violence*, 34 West. State Univ. L. Rev. 173, 184-185 (2007).

[29] Ruth E. Fleury et al., *When Ending the Relationship Doesn't End the Violence*, 6 Violence Against Women 1363, 1364 (2000).

(thirty percent) of all homicides of women.[30] For Native women, this number is much higher; as Congress noted in 2005, "Homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and . . . *75 percent of those deaths were committed by a family member or acquaintance*." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain), 2005 WL 1106816 (Westlaw) (emphasis added).

Tribal-federal coordination in investigating and prosecuting crimes committed against Native women and children is, therefore, critical. This coordination is facilitated by the dual sovereignty doctrine, which allows both sovereigns to share information and collaborate without foregoing the ability to prosecute the case in their own court. Continued coordination, therefore, is predicated on this Court's continued recognition of the United States' and Tribal Nations' separate sovereign prosecutorial and sentencing authorities. Forcing Tribal Nations to choose between effective prosecution and sentencing, or risking no prosecution at all, places Tribal Nations in a Catch-22 that would not serve a constitutional purpose under the Double Jeopardy Clause, and ultimately, would only put the safety, health, and welfare of Native women and children in even greater danger.

---

[30] *See* Lawrence Greenfeld et al., U.S. Dep't of Justice, NCJ-167237, *Violence by Intimates* 6 (1998), http://bjs.gov/content/ pub/pdf/vi.pdf. In fact, physical violence is the "primary risk factor for intimate partner femicide." Jane Koziol-McLain et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Public Health 1089, 1091 (2003).

D. The "Separate Sovereigns" Exception, As Applied To Tribal Court Prosecutions, Should Not Be Disturbed.

As this Court has previously held, "the dual sovereignty doctrine is founded on the common law conception of crime as an offense against the sovereignty of the government." *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Thus, "[w]hen a single act violates the peace and dignity of two sovereigns by breaking the laws of each, [the defendant] has committed two distinct offences." *Id.*; *see also Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847) ("[O]ffences falling within the competency of different authorities to restrain or punish them" are properly "subjected to the consequences which those authorities might ordain and affix to their perpetration").

Accordingly, in the context of dual federal and tribal prosecutions, this Court has determined that "prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *United States v. Wheeler*, 435 U.S. 313, 317 (1978) (quoting Double Jeopardy Clause). For instance, in considering a federal prosecution of a Navajo Nation citizen that followed a criminal prosecution by the Navajo Nation, the Supreme Court determined that the Double Jeopardy Clause in no way prohibited the subsequent federal prosecution. *See id.* Instead, this Court concluded that "[s]ince tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred." *Wheeler*, 435 U.S. at 329-30 (quoting Double Jeopardy Clause).

In the tribal context, accordingly, the "separate sovereigns" doctrine affirms and preserves the inherent sovereignty of Tribal Nations to prosecute crimes committed against their own citizens on tribal lands—regardless of what actions another sovereign may or may not take with regards to the same or similar crime. The preservation of both sovereigns' ability to prosecute, as demonstrated above, is critical to ensuring safety for Native women and children. The aforementioned collaborations between U.S. Attorneys and Tribal Prosecutors would not be possible if the Double Jeopardy Clause were suddenly applicable to Tribal Court prosecutions.

II. Petitioner Provides No Sound Basis Or Rationale For The Eradication Of The "Separate Sovereigns" Doctrine.

Petitioner's broad arguments against the doctrine's legitimate constitutional underpinnings overlook the doctrine's application to Tribal Court prosecutions, and consequently, do not support the eradication of the doctrine in its entirety.

A. The Incorporation Of The Bill Of Rights Bears No Constitutional Relevance To The Application Of The "Separate Sovereigns" Doctrine To Tribal Prosecutions.

Again, Petitioner's attacks on the constitutional legitimacy of the "separate sovereigns" doctrine bear no relevance to its application to Tribal Court prosecutions.

First, Petitioner asserts that the "separate sovereigns" doctrine should be eradicated because the exception "was built on a jurisprudential foundation

that crumbled when the Double Jeopardy Clause was incorporated against the states." Pet'r's Br. 31. Petitioner's argument, however, assumes that the doctrine's constitutional underpinnings rely on the exclusive recognition of two sovereigns: the States and the United States. It does not. Time and time again, this Court, as well as numerous other federal courts, have affirmed the doctrine's application to Tribal Court prosecutions. *See, e.g.*, *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1872 (2016) (affirming the application of the "separate sovereigns" exception to tribal court prosecutions because "[a] tribal prosecution . . . is attributable in no way to any delegation . . . of federal authority[,] . . . . [a]nd that alone is what matters for the double jeopardy inquiry.") (internal quotation marks and citation omitted).

And, to be sure, the entirety of the "separate sovereigns" doctrine did not crumble when this Court, in 1967, incorporated the Bill of Rights against the States. Instead, the "separate sovereigns" doctrine, as applied to Tribal Court prosecutions, recognizes the inherent sovereignty of Tribal Nations to make their own laws and be guided by them—a sovereignty that pre-dates not only the incorporation of the Bill of Rights against the States, but also the passage of the Bill of Rights, and even the formation of the United States.

As this Court affirmed just two terms ago, Tribal Nations constitute "separate sovereigns pre-existing the Constitution," and as such, "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Bryant*, 136 S.Ct. at 1962 (internal quotation marks and citations omitted). "The Bill of Rights, . . . therefore, does not apply in tribal-court proceedings." *Id.*

The inherent authority of Indian Nations to prescribe their own criminal laws for crimes committed on their lands, therefore, is not constrained by either the Bill of Rights or the Fourteenth Amendment, as neither of their own force apply to Indian Nations. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896); *see also Lara*, 541 U.S. at 205 ("[T]he Constitution does not dictate the metes and bounds of tribal autonomy. . . ."). Rather than being subject to the United States Constitution, Tribal Governments are instead subject to their own Constitutions, and as such, their inherent sovereignty is constrained only by "the supreme legislative authority of the United States." *Talton*, 163 U.S. at 384. Accordingly, "unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal citations and quotation marks omitted).

In enacting ICRA, "Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo*, 436 U.S. at 57 (citing 25 U.S.C. § 1302). Thus, "[i]n addition to other enumerated protections, ICRA guarantees 'due process of law,' and allows tribal-court defendants to seek habeas corpus review in federal court to test the legality of their imprisonment." *Bryant*, 136 S.Ct. at 1962 (quoting 25 U.S.C. § 1302(a)(8), §1303).

And although "ICRA requires tribes to accord all persons within their jurisdiction enumerated rights akin to the federal Bill of Rights" (*Kelsey v. Pope*, Case No. 14-1537, 2016 WL 51243, at *11 (6th Cir. 2016)), Congress elected not to incorporate the Bill of Rights

as a whole and instead "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62.

Congress's incorporation of the Double Jeopardy Clause against Tribal Nations is limited to dual prosecutions by a Tribal Nation and explicitly does not bar subsequent state or federal prosecutions, that is, prosecutions by "separate sovereigns." Congress' election to only preclude double Tribal Court prosecutions in ICRA's requirements, therefore, constitutes a constitutional exercise of Congress's exclusive power over Indian affairs—one with which this Court should not interfere. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (Congress' authority over Indian affairs "has always been deemed a political one, not subject to be controlled by the judicial department of the government"); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2030 (the Court has "consistently described [Congress' authority] as *plenary and exclusive* to legislate [with] respect to Indian tribes") (internal citations and quotation marks omitted) (emphasis added).

The incorporation of the Bill of Rights against the States, therefore, did not eradicate the constitutional underpinnings for the entirety of the "separate sovereigns" doctrine. Such a conclusion would undermine Congress' exclusive constitutional authority to legislate concerning Tribal Nations, and furthermore, would require this Court to take a myopic view of a doctrine that has never recognized two sovereigns alone. Because Tribal Nations pre-date the United States, the U.S. Constitution, and all of its amendments, the Double Jeopardy Clause in no way prohibits dual

federal and tribal prosecutions. *See, e.g., Wheeler*, 435 U.S. 313 (1978).

B. The Application Of The Separate Sovereigns Doctrine To Tribal Court Prosecutions Does Not Implicate Federalism.

Likewise, Petitioner's arguments that the "separate sovereigns" exception violates fundamental principles of federalism bear no relevance to dual prosecutions by federal and tribal authorities.

Petitioner asserts that the "separate sovereigns" doctrine should be overturned because "[t]he separate-sovereigns exception turns federalism on its head." Pet. Br. 29. That is, according to Petitioner, this Court must do away with "[t]he separate-sovereigns exception" because "[t]he division of power 'between two distinct governments'—state and federal—was designed to afford a 'double security . . . to the rights of the people.'" Pet'r's Br. 29 (quoting The Federalist No. 51 (James Madison). Petitioner's argument, again, wrongfully assumes that the "separate sovereigns" exception was crafted only to address the intersections of criminal prosecutions between two interrelated sovereigns: the United States and the States.

Tribal Nations, however, were not created as a part of the "two distinct governments" system articulated in the Federalist Papers or cemented in the U.S. Constitution. Instead, Tribal Nations constitute "'separate sovereigns pre-existing the Constitution,'" and thus "have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Bryant*, 136 S.Ct. at 1962 (internal citations and quotation marks

omitted); *see also Talton*, 163 U.S. at 383("Indian nations ha[ve] always been considered as distinct, independent political communities . . . .") (citation and quotation marks omitted). As such, neither the Tenth Amendment nor principles of federalism justify the erasure of the "separate sovereigns" exception as applied to Tribal Court prosecutions.

Despite a regrettable history of policies that sought to exterminate tribal governments and their citizens, Indian Nations have survived and remain both sovereign and distinct, a "separate people, with the power of regulating their internal and social relations. . . ." *Kagama*, 118 U.S. at 381–82. One of the attributes of sovereignty that Indian Nations maintain today is the "power to prescribe and enforce internal criminal laws." *Wheeler*, 435 U.S. at 326. And thus "unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form." *Sanchez Valle*, 136 S.Ct. at 1872.

In the federal-tribal context, then, the "separate sovereigns" doctrine is not at odds with federalism, but rather, this Court's well-founded guidance and precedent underscores the manner in which the doctrine has affirmed the historic sovereign-to-sovereign relationship between Tribal Nations and the United States—one that pre-dates the U.S. Constitution and all of its amendments.

C. The "Separate Sovereigns" Exception Recognizes That The "Unique Source" Of Tribal Nations' Criminal Prosecutorial Power Pre-Dates The U.S. Constitution.

Ultimately, Petitioner's broad sweeping attacks on the "separate sovereigns" exception fall short of justifying any eradication of the doctrine in the federal-tribal context.

As this Court recently held, the "separate sovereigns" exception to the Double Jeopardy Clause affirms that "[t]he 'ultimate source' of a tribe's 'power to punish tribal offenders'" constitutes a "pre-existing" sovereignty. *Sanchez Valle*, 136 S.Ct. at 1872 (2016) (quoting *Santa Clara Pueblo*, 436 U.S., at 56. The inherent sovereignty of Tribal Nations, therefore, "is 'attributable in no way to any delegation of federal authority.' . . . [a]nd that alone is what matters for the double jeopardy inquiry." *Sanchez Valle*, 136 S.Ct. at 1872 (quoting *Santa Clara Pueblo*, 436 U.S., at 56 (internal ellipses omitted).

Accordingly, this Court, and numerous lower federal courts, have repeatedly affirmed the pre-existing inherent authority of Tribal Nations to prosecute, as separate sovereigns, the crimes that occur on their lands. For instance, in *United States v. Lara*, this Court reasoned that "the Spirit Lake Tribe's prosecution of Lara did not amount to an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign." *Lara*, 541 U.S. at 210 (2004). Because the Spirit Lake Tribe acted in its own capacity as a separate sovereign, "the Double Jeopardy Clause [did] not prohibit the Federal Government from proceeding with" its own "prosecution for a discrete federal offense." *Id.*; *see also United States v Enas*, 255 F.3d 662, 667

(9th Cir. 2001) ("When a tribe exercises inherent power, it flexes its own sovereign muscle, and the dual sovereignty exception to double jeopardy permits federal and tribal prosecutions for the same crime.").

Likewise, this Court has affirmed the importance of preserving the inherent right of Tribal Nations to criminalize and punish crimes committed on tribal lands, since "[f]ederal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government." *Wheeler*, 435 U.S. at 332; *see also id.* ("[T]ribal courts are important mechanisms for protecting significant tribal interests."). Petitioner points to nothing in the U.S. Constitution—or any of its Amendments—that diminishes the inherent authority of Tribal Nations. And as this Court has repeatedly affirmed, "Indian tribes have not given up their full sovereignty." *Id.* at 323.

And although "Congress has in certain ways regulated the manner and extent of the tribal power of self-government[, that] does not mean that Congress is the source of that power." *Id.* at 328. Instead, "this Court has held firm and fast to the view that Congress' power over Indian affairs does nothing to gainsay the profound importance of the tribes' pre-existing sovereignty." *Sanchez Valle*, 136 S.Ct. at 1863 n.5 (citations omitted); *see also Lara*, 541 U.S. at 204 (affirming Tribal Nations' "authority to control events that occur upon the tribe's own land").

Petitioner has pointed to no act of congressional legislation that, in any way, alters the pre-existing sovereignty of Tribal Nations—or more pointedly, declares the Double Jeopardy Clause applicable to Tribal Court prosecutions. Accordingly, until or unless Congress acts, the "separate sovereigns" exception

remains constitutionally necessary to preserve the inherent "pre-existing" sovereignty of Tribal Nations that this Court has repeatedly affirmed and upheld.

Petitioner's broad-based attack on the "separate sovereigns" doctrine ignores the federal-tribal context. The application of the doctrine in that context rests on independent moorings and plays a critical role in effective law enforcement in Indian country. *Amici* ask that this Court leave the important role that the doctrine plays in Indian country undisturbed.

CONCLUSION

The decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

SARAH DEER
UNIVERSITY OF KANSAS
1541 Lilac Lane
Lawrence KS 66045
(785) 864-9713
sarah.deer@ku.edu

MARY KATHRYN NAGLE
Counsel of Record
WILSON K. PIPESTEM
ABI FAIN
JORDAN HARMON
PIPESTEM LAW P.C.
320 S. Boston Ave
Suite 1705
Tulsa, OK 74103
(202) 407-0591
mknagle@pipestemlaw.com

Counsel for Amici Curiae

November 1, 2018